Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

MARK RICHARDSON,

Petitioner,

v.

STATE FARM FIRE & CASUALTY COMPANY,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In the context of this court's decision in *Erie Railroad Company v. Tompkins* (1938) 304 US 64, may a Federal Court in deciding a substantive issue in a diversity case adopt and employ a rule of law which expressly contravenes the State substantive rule of law as declared by the applicable State Supreme Court? Specifically, may the Ninth Circuit employ the "but for" test so as to uphold a motor vehicle exclusion contained in a homeowner's insurance police despite the express rejection of that test by the California Supreme Court.

II.

THE NINTH CIRCUIT CONTRAVENED THE CALIFORNIA SUPREME COURT'S MANDATE THAT THE "BUT FOR" TEST NOT BE USED IN DETERMINING WHETHER AN ACT OF NEGLIGENCE WAS AN INDEPENDENT CONCURRENT CAUSE OF INJURY 11

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PETITION FOR WRIT OF CERTIORARI

The petitioner, Mark Richardson, respectfully prays that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in the above proceedings on March 8, 1994, and the denial of petitioner's petition for rehearing on April 15, 1994.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reprinted in the appendix hereto, p. 99a, *infra*.

The memorandum decision of the United States District Court for the Eastern District of California (The Honorable Oliver W. Wanger) is reprinted in the Appendix hereto, p. 1a, *infra*.

JURISDICTION

Following two years of extensive litigation in state court and on the eve of trial, petitioner Richardson obtained a California Judgment against respondent State Farm's insured, Linda Meaders, for One Million Dollars ($1,000.000.00), $25,000 of which was satisfied under a separate insurance policy. Petitioner sought to enforce the unsatisfied $975,000.00 portion of the judgment in a separate state court action against respondent State Farm pursuant to California Insurance Code §11580 and as assignee of Ms. Meaders' bad faith right of action against State Farm. (Appendix -District Court Opinion, p. 1a, 6a, District Court Undisputed Material Facts and Conclusions of Law, p. 57a, 58a, Judgment, p. 95a, 96a, Amendment, p. 97a, 98a.) Petitioner's action against State Farm had

been filed on February 28, 1991 in the Superior Court in and for the County of Tulare, California, and was removed to Federal Court by respondent, which invoked federal diversity jurisdiction under 28 U.S.C. §1332. (Appendix - Ninth Circuit Memorandum Opinion Reversing District Court Judgment, p. 101a, District Court Opinion, p. 1a, 2a, 6a, District Court Undisputed Material Facts and Conclusions of Law, p. 57a, 58a.)

On August 3, 1992, following cross-motions for summary judgment, the United States District Court for the Eastern District of California, the Honorable Oliver W. Wanger, Judge, entered summary judgment in favor of petitioner. (Appendix - District Court Opinion, p. 1a, District Court Undisputed Material Facts and Conclusions of Law, p. 40a, Judgment, p. 95a, Amendment to Judgment, p. 97a.) Respondent appealed, seeking reversal of the summary judgment in favor of petitioner and seeking a direction to the District Court to grant summary judgment in favor of respondent. The Ninth Circuit on March 8, 1994, reversed the judgment of the United States District Court and directed the United States District Court to enter summary judgment in favor of respondent. (Appendix - Ninth Circuit Memorandum Opinion Reversing District Court Judgment, p. 99a.) The Ninth Circuit on April 15, 1994, denied petitioner's

petition for rehearing. (Appendix - Ninth Circuit Denial of Rehearing, p. 107a.)

The jurisdiction of this Court to review the judgment of the Ninth Circuit is invoked under 28 U.S.C. §1254(1).

UNITED STATES CONSTITUTIONAL PROVISION INVOLVED

Amendment 5

No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .

STATUTE INVOLVED

28 U.S.C. § 725

The laws of the several states, except where the Constitution, treaties or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply.

STATEMENT OF THE CASE

On April 30, 1988, when Mark Richardson was a 16-year-old minor, he was temporarily staying at the residence of State Farm's insured, Linda Meaders. Mark had a history of alcohol abuse, a fact known to Ms. Meaders. Ms. Meaders purchased and provided alcohol for Mark and other minor children temporarily staying with her. Mark consumed alcohol provided by Ms. Meaders on April 30, 1988. After having consumed the alcohol, and while under the influence of same, Mark began performing major engine repair on a van owned by Ms. Meaders. A fire occurred resulting in extreme and mutilating burn injuries to Mark. (Appendix - District Court Undisputed Material Facts and Conclusions of Law, p. 41a-45a, District Court Opinion, p. 2a, 3a.)

The underlying state court Complaint alleged that Ms. Meaders' negligent providing of alcohol to Mark Richardson, an alcohol-abusing minor, was a proximate cause of Mark's injuries. (Appendix - District Court Undisputed Material Facts and Conclusions of Law, p. 45a, 47a, District Court Opinion, p. 14a.) Respondent provided a homeowner's insurance policy to Ms. Meaders which insured her against personal liability, but contained an exclusion as to liability arising out of the ownership, maintenance or use of a motor vehicle (or supervision

with regard thereto). (Appendix - District Court Undisputed Material Facts and Conclusions of Law, p. 46a, District Court Opinion, p. 4a, 5a.) Under circumstances and allegations legally indistinguishable from the present case, the California Supreme Court previously ruled that such motor vehicle exclusion is no bar to coverage. (*State Farm Mutual Automobile Ins. Co. v. Partridge* (1973) 10 Cal.3d 94.)

In his summary judgment motion before the United States District Court, Mark contended, in accord with *Partridge*, that his injuries resulted from two independent, concurrent causes - both acts of negligence committed by State Farm's insured, Ms. Meaders. (Appendix - District Court Opinion, p. 6a.) One such act was covered by the subject insurance policy, i.e., negligently providing of alcohol to a known, alcohol-dependent minor. The other act of negligence was not covered, i.e., allowing an ill-trained and ill-equipped minor to perform dangerous repair to a motor vehicle. (Appendix - District Court Opinion, p. 4a.) Under *Partridge*, petitioner contended that these two separate acts of negligence were independent of each other because the occurrence of one did not depend upon the occurrence of the other. In other words, some type of injury could have resulted from either cause with or without the occurrence of the other.

Thus, *Partridge* affords coverage despite an excluded cause if there exists an independent concurrent covered cause.

State Farm argued, contrary to the express holding in *Partridge*, that "but for" the involvement of the motor vehicle, Mark would not have been injured. (Appendix - District Court Opinion, p. 7a, 9a, 14a, 15a.) By such improper application of the "but for" test, State Farm argued that the negligent providing of alcohol was not a cause independent of its insured's negligence as relates to the ownership, maintenance, use, entrustment or supervision of a motor vehicle.

The United States District Court granted petitioner's Motion for Summary Judgment on the ground that respondent had refused to defend its insured and refused to accept a reasonable settlement offer within policy limits, in the face of potential coverage. (Appendix - District Court Opinion, p. 25a, 33a, 38a, 39a, District Court Undisputed Material Facts and Conclusions of Law, p. 66a, 68a, 71a, 77a, 78a, 79a, 80a, 81a, 82a, 83a, 84a, 86a, 89a, 91a.) The potential coverage was based upon the existence of an independent concurrent cause of injury, i.e., providing alcohol to a known alcohol dependent minor, in addition to an excluded cause of injury, under the California rule of law established in *State Farm Mutual Automobile Ins. Co. v. Partridge* (1973) 10

Cal.3d 94. (Appendix - District Court Undisputed Material Facts and Conclusions of Law, p. 66a.) The *Partridge* test for the existence of an independent concurrent negligent cause of injury was whether there was an independent act of negligence which could have caused some injury in some fashion without involvement of the excluded cause of injury. The California Supreme Court in *Partridge* expressly rejected the notion that a "but for" test may be used to defeat the contention that an independent, concurrent, negligent cause existed. (See *Partridge* analysis - Part II *infra*).

On State Farm's appeal of the District Court judgment, the Ninth Circuit employed the mechanical "but for" test which had been expressly rejected by the California Supreme Court in *Partridge*. The Ninth Circuit determined that merely because Mark's particular injury did not occur but for the use of the vehicle, the furnishing of alcohol to Mark could not be considered an independent concurrent cause of injury, even though such furnishing could have caused injury to Mark in the absence of the use of the motor vehicle. The Ninth Circuit said, "Richardson's injuries could not have happened unless he had been engaged in maintaining the van or was negligently supervised in doing so." (Emphasis added.) (Appendix - Ninth Circuit Memorandum Opinion Reversing District Court Judgment, p. 106a.) In adopting

that reasoning, the Ninth Circuit expressly adopted and employed a rule of law contrary to the rule announced and employed by the California Supreme Court in *Partridge*. For that reason, Mark petitions this Court for a writ of certiorari.

REASONS FOR GRANTING WRIT

I.

THIS COURT'S HOLDING IN *ERIE RAILROAD COMPANY v. TOMPKINS* MANDATES THAT THE CIRCUIT COURTS FOLLOW SUBSTANTIVE STATE LAW AS DECLARED BY THE STATE SUPREME COURTS IN DIVERSITY CASES.

Erie Railroad Company v. Tompkins (1938) 304 US 64, held that in a diversity case the Federal Court deciding the case must apply the substantive law of the state which applies to the case. 28 U.S.C. §725, provides in substance that State law be regarded as furnishing the rule of decision in a trial at common law, except where the Constitution, treaties or statutes of the United States otherwise require. This Court held that such statute mandated the application of State law in a diversity case. If the rule were otherwise, this Court in *Erie* noted, then Federal Courts would be free to deviate from State

common law as declared by the highest State court; the result would be the discriminatory application of State law as between citizens and non-citizens of a State, leading to the denial of due process of law mandated by the Fifth Amendment to the United States Constitution.

Following *Erie*, this Court declared in *Guaranty Trust Co. of New York v. York* (1945) 326 US 99, 112, 65 S.Ct. 1464, 1471:

> The source of substantive rights enforced by a Federal Court under diversity jurisdiction . . .is the law of the States. Whenever that law is authoritatively declared by a State, whether its voice be the legislature or its highest court, such law ought to govern in litigation founded on that law, whether that form of application is a State or a Federal Court and whether the remedies be sought at law or may be had in equity. (Emphasis added.)

This Court has therefore made it very clear that under the Erie Doctrine the Federal Courts are required to follow State law as declared by State Supreme Courts in diversity cases.

In this case, the California Supreme Court has expressly declared in *State Farm Mutual Automobile Ins. Co. v. Partridge* (1973) 10 Cal.3d 94, 105 fn. 11, that the

"but for" test is not to be used in determining whether a non-excluded act of negligence is an independent concurrent cause of injury (resulting in insurance coverage despite the existence of an excluded concurrent cause). The only test is whether the non-excluded act of negligence could have caused some injury (not necessarily the precise injury which occurred) in the absence of the excluded cause.

II.

THE NINTH CIRCUIT CONTRAVENED THE CALIFORNIA SUPREME COURT'S MANDATE THAT THE "BUT FOR" TEST NOT BE USED IN DETERMINING WHETHER AN ACT OF NEGLIGENCE WAS AN INDEPENDENT CONCURRENT CAUSE OF INJURY.

At age 16, petitioner, Mark Richardson, was mutilated by a fire encompassing more than 50% of his body. The accident occurred when gasoline spilled upon him and ignited while he was making repairs beneath an automobile owned by State Farm's insured, Linda Meaders. At the time of injury, Mark was impaired by alcohol which had previously been negligently furnished to him by the insured. Mark had a longstanding alcohol abuse problem, known to the insured. The insured was

not even home, let alone supervising, at the time of injury. (Appendix - District Court Opinion, p. 1a, 2a, 3a, District Court Undisputed Materials Facts and Conclusions of Law, p. 40a-45a, 54a, 55a, 66a.)

The minor filed an action against the insured, alleging that before the accident he was temporarily living with the insured, who had actual knowledge of the minor's alcohol abuse problems. The complaint further alleged that despite that knowledge, the insured purchased and provided alcohol to the minor. The insured admitted in her deposition testimony that prior to the subject accident, while the minor was living with her, she routinely made alcohol available to him and other minors living there. (Appendix - District Court Undisputed Materials Facts and Conclusions of Law, p. 40a-45a, 54a, 55a.)

The homeowner's carrier, State Farm, refused to defend its insured, raising the automobile exclusions. (Appendix - Excerpts of State Farm Homeowner's Insurance Policy, p. 109a, 110a, District Court Opinion, p. 4a, District Court Undisputed Material Facts and Conclusions of Law, p. 50a.) The exclusions purported to exclude coverage for injuries as follows:

1. "Arising out of the ownership, maintenance, use, loading or unloading of . . . a motor vehicle owned . . . by . . . any insured;"

2. "Arising out of" the entrustment to or negligent supervision of any person by any insured, "with regard to ownership, maintenance, or use of any . . . motor vehicle."

Petitioner obtained a judgment in state court for One Million Dollars ($1,000,000.00) against the insured Ms. Meaders. The minor then filed an action in state court against State Farm both directly under California Insurance Code Section 11580 and as assignee of Ms. Meaders' bad faith action against State Farm which removed this matter to Federal Court under diversity jurisdiction. Cross-motions for summary judgment were filed. The Honorable Oliver Wanger, Judge of the United States District Court, Eastern District of California, granted the minor's motion for summary judgment, finding that under the doctrine set forth in the California Supreme Court decision of *State Farm Mutual Auto. Ins. Co. v. Partridge* (1973) 10 Cal.3d 94, the exclusion in the homeowner's policy did not apply under the facts of this case. The Ninth Circuit has erroneously reversed the District Court's ruling, contravening the *Partridge* court's binding rejection of the mechanical "but for" causal analysis. The Ninth Circuit expressly adopted the "but for"

test, misreading a lower court case which itself misread *Partridge*. (Appendix - 9th Circuit Memorandum Opinion Reversing District Court Judgment, p. 106a.)

Partridge involved an insured (under a homeowner's policy) who negligently filed the trigger of a handgun to the point that it became a hair trigger. Thereafter, that same insured negligently drove his motor vehicle driving across country as he and his passenger were hunting rabbits. The negligent driving caused the gun to discharge, injuring the passenger. *Partridge* specifically held that the motor vehicle exclusion did not apply because the insured had committed an act of negligence - negligently filing the hair trigger - which was independent of (not dependent upon) the fortuitous involvement of the automobile.

Thus, for 21 years, the law of California has been well settled that a negligent act which is independent of, i.e., not dependent upon, negligent ownership, use, maintenance or supervision of a motor vehicle is not excluded under a homeowner's policy. Two acts are independent, as in the *Partridge* case, when one negligent act does not depend for its occurrence upon the happening of the other. Despite the fact that in *Partridge* the automobile caused the accident, the Court expressly rejected the "but for" argument propounded by the

insurance carrier (coincidentally - State Farm Fire & Casualty Company). In *Partridge*, State Farm argued without success that the negligent filing of the hair trigger could not have caused the injury without the negligent operation of the motor vehicle.

The *Partridge* Court reaffirmed its reasoning in *Sabella v. Wisler* (1963) 59 Cal.2d 21, rejecting the "but for" test in determining insurance coverage. In *Sabella*, 59 Cal.2d at p. 33, the Court had held that a loss "proximately caused" by a covered peril would still be covered even though an excluded peril was a "but for" cause of the loss. The *Partridge* Court approved that reasoning:

> . . . [T]he *Sabella* Court rejected the insurer's contention that coverage was unavailable whenever an excluded risk constituted a "but for" cause of an accident. The *Sabella* Court declared: "[I]f [California Insurance Code] Section 532 were construed in the manner contended for by defendant insurer, where an excepted peril operated to any extent in the chain of causation so that the resulting harm would not have occurred "but for" the excepted peril's operation, the insurer would be exempt even though an insured peril was the proximate cause of the loss. Such a result would be directly contrary to the provision in

> [California Insurance Code] Section 530 . . . for liability of the insurer where the peril insured against proximately resulted in the loss. (*Partridge*, supra, 10 Cal.3d at p. 105 fn. 11.)

California Insurance Code Sections 530 and 532 are still effective today.

In the instant case, the Ninth Circuit contravened the crucial feature of the entire *Partridge* analysis by adopting the very argument which the California Supreme Court expressly rejected in *Partridge*. Erroneously embracing the "but for" test, the Ninth Circuit concluded that in this case, "Richardson's injuries could not have happened unless he had been engaged in maintaining the van or was negligently supervised in doing so." (Appendix - Ninth Circuit Memorandum Opinion Reversing District Court Judgment, p. 99a.) The Ninth Circuit then disposed of this case on that ground. The Ninth Circuit thus "overruled" *Partridge* by confusing the fortuitous sequence of events which caused a particular accident to occur with the *Partridge* principle that an independent act of negligence generates independent liability (coverage) regardless of how that act concurred with another (excluded) act to cause the particular injury.

In *Partridge*, the gun with the hair trigger could not have injured the victim unless there had been negligent driving under the sequence of events which actually caused injury. Thus, the proper test is not whether the vehicle related negligence did in fact cause injury in the specific case, but whether an injury could have occurred without the fortuitous involvement of the vehicle. The Ninth Circuit, no doubt, would have applied the same erroneous reasoning adopted herein to conclude, "[Partridge's] injuries could not have happened unless he had been engaged in [riding in the vehicle] or was negligently supervised in doing so." The Ninth Circuit, no doubt, would have denied coverage in *Partridge* itself, based on the misanalysis adopted in the instant case.

What the Ninth Circuit has overlooked about *Partridge*, however, is that the fortuity of how a particular sequence of events caused the particular injury is not significant. The mere fact that Richardson's particular injury (from a vehicle catching fire) involved a motor vehicle does not end the analysis. *Partridge's* particular injury could not have happened without a vehicle either. The test, as the California Supreme Court laboriously explained in *Partridge*, is not whether the particular injury "could have happened without the vehicle", but rather whether there was an independent act of negligence which could have

caused some injury in some fashion without vehicle involvement.

In *Partridge*, the negligent filing of the trigger made the gun more dangerous, so that it could have gone off in any number of factual scenarios. For that reason, the California Supreme Court (unlike the Ninth Circuit) looked beyond the tautological and trivial observation that the particular accident could not have happened without a vehicle. If the driver had not driven negligently and hit a bump, the gun would not have discharged and the *Partridge* victim would not have been injured. The California Supreme Court still found coverage, because there were scenarios in which injury might have occurred (although it actually did not) without vehicle involvement. The California Supreme Court provided hypothetical examples of how the shooting victim could have been injured without involvement of the motor vehicle.

> A hypothetical may serve to explain further our conclusion in this regard. If, after negligently modifying the gun, Partridge had lent it to a friend who had then driven his own insured car negligently, resulting in the firing of the gun and injuring of a passenger, both Partridge and his friend under traditional joint tort-feasor principles would be liable for the injury. In such

> circumstances, Partridge's personal liability would surely be covered by his homeowner's policy, and his friend's liability would be covered by automobile insurance. When viewed in this perspective, it can be seen that State Farm is presently attempting to escape liability under the homeowner's policy simply because, in the instant case, both negligent acts happened to have been committed by a single tort-feasor. In our view, this coincidence cannot defeat the insurer's obligation to indemnify the insured for liability arising from non-automobile risks. (*State Farm Mutual Automobile Ins. Co. v. Partridge* (1973) 10 Cal.3d 94, 103.)

The *Partridge* Court also noted:

> If the gun had accidently fired while the insured was walking down the street or running through the woods, the insurer admits that any resultant damage would clearly be covered by the policy. (Ibid.)

The Ninth Circuit is bound by the California Supreme Court's *Partridge* decision and therefore must follow the *Partridge* test, not the "but for" test expressly rejected in *Partridge*. In the instant case, the independent act of negligence was feeding alcohol to a known alcohol-

dependent minor child. That act was not vehicle related any more than filing a trigger was vehicle related. The minor (intoxicated) could have done any number of unwise things, from repairing a gas powered lawn mower, to flying an airplane, to smoking by a gas pump at a service station. The fortuity that the minor, having been rendered dangerous and incapacitated by the negligence of the insured, happened to select a vehicle as the instrument of his destruction does not (under *Partridge*) provide State Farm with windfall relief from its insured's negligence.

To clarify its rationale, *Partridge* divided the two acts of negligence among two individuals. The same can be accomplished here. To illustrate, assume that the minor was four years old instead of 16. The insured, Ms. Meaders, feeds alcohol to herself and the minor on the front lawn, then falls asleep. The child then crosses the street to a neighbors home and the neighbor negligently permits the now intoxicated child to enter his vehicle which was parked on a sloped driveway. The child is injured after disengaging the parking brake and rolling into the street. Is State Farm relieved from its duty to defend? No - as illustrated in *Partridge*, both Ms. Meaders and the neighbor are joint tort-feasors. Ms. Meaders is covered under her homeowner's policy (regardless of the fortuitous involvement of a motor vehicle) and the

neighbor is covered under his auto policy. Now assume that the four-year-old is given matches to play with by the insured, after both she and the four-year-old are intoxicated. The insured falls asleep in the house, leaving the door open. The four-year-old wanders out to the car which has a gas leak. Playing with matches, the four-year-old sets the car on fire and it explodes, causing injury. Is State Farm relieved from its duty to defend? Under the reasoning of the Ninth Circuit (but not the *Partridge* Court), the answer, incredibly, is yes. Yes - because of the "coincidence" that "both negligent acts happened to have been committed by a single tort-feasor." (Compare *Partridge*, supra, 10 Cal.3d at p. 103.)

Because the issue is a subtle one which will recur in the Federal Courts (given insurance companies' propensity to remove coverage actions to Federal Court), this Court should grant certiorari. The question is one of exceptional importance to the public, bench and bar. It not only affects many cases, with much at stake, but addresses a paramount issue in all diversity cases: whether the Federal Courts are at liberty to overrule (in the guise of "interpretation") binding State Supreme Court authority.

The Ninth Circuit herein also patently misread *Hartford Fire Ins. Co. v. Superior Court* (1983) 142 Cal.App.3d 406. In *Hartford*, an adult pilot himself

consumed alcohol before flying an airplane. The airplane crashed and the estate of the passengers sued the estate of the pilot, alleging that the pilot had consumed alcohol prior to flying the airplane. The defending insurance carrier argued that there was no coverage, premised upon an airplane exclusion. As the Ninth Circuit noted in the present case, at page six of its decision, "the Court [in Hartford] reasoned that consumption of alcohol alone was not negligent; only the act of piloting a plane while intoxicated could have given rise to the accident. Thus, any damage caused while operating the aircraft under the influence of alcohol was wholly dependent on the operation of the airplane and *Partridge* did not apply." (Emphasis added.) (Appendix - Ninth Circuit Memorandum Opinion Reversing District Court Judgment, p. 105a.)

The Ninth Circuit's own statement belies its erroneous conclusion that Hartford "controls" the present case. In *Hartford*, the exclusion applied so as to bar coverage because the act of consuming alcohol by an adult is not negligent conduct. Therefore, there could be no liability (and hence no coverage) without use of the airplane for an obvious reason: the only "act of negligence" was the drunken adult pilot's flying of the airplane. The adult's consumption of alcohol was not, as a matter of law, an "act of negligence."

The Ninth Circuit completely overlooked that most crucial aspect of *Hartford*, which is not present in the instant case. Here, unlike in *Hartford*, the insured's feeding alcohol to a child was an act of negligence in and of itself, regardless of what the child later did while intoxicated. The insured in the instant case did not consume alcohol herself, then drive her car to hit Richardson while intoxicated. Under that scenario, *Hartford* might apply. Where the "independent act of negligence", however, is not the consumption of alcohol by the adult insured, but rather the feeding of alcohol to a child by the insured, *Hartford* plainly has no application.

Under *Partridge*, the court first determines whether the alleged independent act of the insured is, in and of itself, negligence. If that conduct is negligence and is a proximate cause of the accident, the exclusion will not operate to avoid coverage. In *Hartford*, there was admittedly no separate independent act of negligence by the insured. There was such an independent act in the present case - the insured's furnishing of alcohol to a 16-year-old boy whom she knew to have an alcohol problem. Such conduct was blatant negligence.

The Ninth Circuit's statement that, "Richardson's injuries could not have happened unless he had been engaged in maintaining the van or was negligently

supervised in doing so" contravenes *Partridge's* admonition not to use the "but for" test in these types of cases. (Emphasis added.) If the California Supreme Court had used the "but for" test in the *Partridge* case, the Court in *Partridge* itself would not have found coverage therein. Using the "but for" test would have made it very simple for the *Partridge* Court to say, "but for the use of the automobile there would have been no accident".

The Ninth Circuit's erroneous embrace of *Hartford* also contravenes its duty to follow the California Supreme Court's rejection of the "but for" test in *Partridge*. Contrary to the Ninth Circuit's assumption, it is *Partridge*, not *Hartford*, which is controlling. *Hartford* has value only to the extent that it correctly interprets *Partridge*. The *Hartford* court, however, misread *Partridge* itself in erroneously promoting the "but for" test which *Partridge* had rejected:

> In sum, in the case at bench, the accident could not have happened but for the operation and use of the aircraft by Thomas Tobin. (*Hartford, supra*, 142 Cal.App.3d at p. 415; emphasis in original.)

Hartford may have been correctly decided because the consumption of alcohol alone by an adult is not negligence. However, the *Hartford* Court's use of the "but for" analysis was contrary to *Partridge*. *Partridge* endorsed

a prior California Supreme Court holding in *Sabella v. Wisler* (1963) 59 Cal.2d 21, 33, which "rejected the insurer's contention that coverage was unavailable whenever an excluded risk constituted a 'but for' cause of an accident." (*Partridge, supra*, 10 Cal.3d at p. 105, fn. 11.) The dissent in *Partridge* objected to the majority's rejection of the "but for" test. (Id. at p. 108.) Thus, the *Hartford* court's promotion of the "but for" test contravenes *Partridge*, and it is *Partridge*, not *Hartford*, which is binding on the Ninth Circuit. By overlooking and "overruling" *Partridge*, the Ninth Circuit has exceeded the bounds of its constitutional and statutory authority, which mandates that California substantive law, as declared by the California Supreme Court, be applied by the Ninth Circuit.

The Ninth Circuit similarly misapplied the clearly inapplicable case of *State Farm Fire and Casualty Co. v. Camara* (1976) 63 Cal.App.3d 48, 54-55. That case held that the negligent design of a dune buggy could not cause injury independent of the use of the dune buggy. It is obvious, however, that the negligent design of a vehicle can only cause injury when the vehicle is "used." The negligent impairment of a minor with alcohol, on the other hand, can cause injury to the minor in any number of factual scenarios.

State Farm can gain no comfort from the argument that providing alcohol was "negligent supervision." In order to be applicable, the exclusion for "negligent supervision" expressly requires that the negligent supervision be, "with regard to ownership, maintenance or use of any . . . motor vehicle." (Emphasis added.) (Appendix - Excerpts of State Farms Homeowner's Insurance Policy, p. 109a-110a.) The insured was not even home when the accident occurred. The fact that petitioner fortuitously was "repairing" the insured's vehicle when injured does not, after the fact, transform all prior negligent acts or omissions into supervision "with regard to the motor vehicle".

CONCLUSION

For the reasons set forth herein, this petition for a writ of certiorari should be granted. The decision of the Ninth Circuit should be reversed, and the matter should be remanded to the Ninth Circuit under directions that such Court properly apply the *Partridge* decision in the manner set forth herein by petitioner, resulting in the determination that the negligent provision of alcohol to petitioner was a concurrent cause of his injury, independent of the use of a motor vehicle. For that reason, there was potential coverage and the decision of

the United States District Court, the Honorable Oliver W. Wanger, District Judge, should be reinstated. In the alternative, the Ninth Circuit should be directed to pursue further proceedings in accordance with the principles settled by this Court's determination that Ms. Meaders' negligent furnishing of alcohol to Mark Richardson constituted a concurrent cause of Mark's injury, independent of the use of a motor vehicle.

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